the dismissal purporting to be thus ordered in February was by reason of its origin bad and inoperative."

Article 135(1) does not speak of the dismissing authority but it only says that no public servant shall be dismissed or reduced in rank by any authority subordinate to that by which he was appointed, which means that by virtue of article 135(1) the appointing authority gets the power of dismissal. The jurisdiction and the power of appointment are conferred by articles 140(1) and 144(1). That power by itself implies the power of dismissal or taking disciplinary proceedings.

Delegation is always upon an inferior person. During the British rule even the judges in the Colonies held office at the pleasure of the Crown. (See *Terrel* v. *Secretary of State for the Colonies.*[18]) Under the Constitution the government servants hold office during the pleasure of the Yang di-Pertuan Agong. The pleasure recognised by article 132(2A) is, however, restricted by article 135.

Section 29 of the Interpretation and General Clauses Ordinance 1948 is made expressly applicable to the interpretation of the Constitution by virtue of article 160(1). Section 29 of the Interpretation and General Clauses Ordinance 1948 (now section 47 of the Interpretation and General Clauses Act 1967) is a codification of the well understood rule that the power to terminate flows naturally and as a necessary sequence from the power to create. It is a necessary adjunct of the power of appointment and is exercised as an incident to or consequence of that power. Article 135(1) makes it mandatory that as far as dismissal or reduction in rank of a government servant is concerned it cannot validly be done by an authority which is subordinate to the authority which could have made the appointment at the time of the dismissal. Articles 140(6) (b) and 144(6) afford to the Commission a means of *convenience* in its work, to ease its burden as it were. Article 135, however, secures to the servant concerned a constitutional guarantee that he shall not be dismissed by any subordinate authority. It thus appears that there is capacity for some conflict between the provisions of article 144(6) and the provisions of article 135(1) should the Commission decide to delegate its powers of dismissal to some other person or authority. The conflict thus becomes a conflict between the convenience of the Commission and the constitutional rights guaranteed to the public servant. In the event of such a conflict I think it is the duty of the court to keep preserved the constitutional guarantees enshrined in the Constitution for the benefit of the government servant and the security of his tenure. The conflict between the provisions of the two articles can, however, be reconciled if it is held the Commission has no power to delegate its functions in so far as they relate to the dismissal or reduction in rank of the public servant and I do so hold.

Having held that the Police Force Commission had no valid powers to delegate its authority to the Chief Police Officer in so far as such delegation related to the dismissal or reduction in rank of police personnel and having found that in dismissing the plaintiff PW2 was in fact not acting under any delegation of authority by the Police Force Commission, there will be a declaration in favour of the plaintiff that his dismissal from service was null and void, inoperative and of no effect and that he still continues to be a member of the Royal Malaysian Police Force and that he is entitled to all the arrears of salary as from the date of his purported dismissal, i.e. 19 April 1967. There will also be an order that the defendant do pay the costs of this suit to the plaintiff.

Order accordingly.

Solicitors: *G. T. Rajan & Co.*

MAHAN SINGH v. GOVERNMENT OF MALAYSIA

[O.C.J. (Sharman J.) September 20, 1973]
[Ipoh — Civil Suit No. 296 of 1972]

Practice and Procedure — Application for amendment of statement of claim — Whether leave should be granted — No prejudice to the other side.

In this case in the course of the hearing of the suit the plaintiff applied to amend the statement of claim. The learned Senior Federal Counsel for the defendant objected to the application.

Held: in the circumstances of the case the application to amend should be allowed on payment of costs. The case revolved on the determination of pure questions of law and there could be no prejudice whatsoever to the defendant.

Cases referred to:-

(1) *Tildesley* v. *Harper* 10 Ch. D. 386, 397.
(2) *Clarapede & Co.* v. *Commercial Union Association* 32 W.R. 263.

CIVIL SUIT.

M. Sivalingam for the plaintiff.

Abdul Razak bin Dato Abu Samah (Senior Federal Counsel) and *Lim Beng Choon* (Senior Federal Counsel) for the defendant.

Sharma J.: This is the third day of the hearing of this suit. The whole suit revolves on pure and important questions of law, mostly of constitutional law. The parties had agreed upon facts and it was further agreed that on the basis of those facts alone and some evidence which had already been led before those facts were agreed upon the court should proceed to consider and determine the rights of the parties. The material evidence in this case is all documentary which forms part of agreed bundles 'A' and 'B'.

The learned counsel for the plaintiff has in order to meet an objection raised by the learned Senior Federal Counsel made an application for amendment of the statement of claim by adding paragraph 4(a) thereto. The proposed amendment reads: —

"The plaintiff contends that regulation 44 of the Public Officers (Conduct and Discipline) (General Orders) Regulations 1969 is null and void and ultra vires the provisions of Ordinance No. 1 of 1969 and Article 150 of the Constitution."

The learned Senior Federal Counsel has objected to the amendment on the following grounds:

(a) It is not a *bona fide* application because the plaintiff had sufficient notice that in terminating the services of the plaintiff, the Government was acting under Reg. 44 and that if this regulation was sought to be challenged a plea to that effect should have been taken in the very first instance;

(b) The amendment will cause prejudice to the Government because it may be that the plaintiff may be able to succeed on "this cause of action";

(c) The amendment seeks to introduce a new cause of action.

The law is that if a party intends to apply for determination of a point of law he must raise it on his pleadings. But at the trial itself he may raise a point of law open to him even though not pleaded and in a proper case the court will allow the party to amend his pleadings so as to raise a point of law for argument.

The general principles of granting leave to amend pleadings were laid down by Bramwell L.J., in the case of *Tildesley* v. *Harper*[1] where he said:

"My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise."

Brett M.R. in *Clarapede & Co.*, v. *Commercial Union Association*[2] said:

"However negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs."

The only question which arises in this case is whether the plaintiff was wrongfully dismissed and he certainly had a right to challenge the validity of regulation 44 of the Public Officers (Conduct and Discipline) (General Orders) Regulations 1969 in the first instance. He is asking the court to declare that the order of his compulsory retirement, termination of service, removal, dismissal or whatever name is attributed to it should be declared null and void as it offends the provisions of the Constitution and the rights guaranteed to him thereunder. The only point which is involved in the determination of this suit is a question of law or constitutes a series of questions of law. I am not inclined to think that in the position in which the plaintiff is the present application can be called *mala fide*. He has no doubt brought the Government to court and the Government itself has as much right to fight and resist the claim of the plaintiff as has any other individual in a court of law. It is, however, sometimes said that in dealing with its subjects and citizens the State ought to be a little magnanimous in its attitude to allow its subjects to fully air their grievances in courts of justice and not put in procedural impediments in their way. The Government has its rights under the law and I am bound to respect those rights in the same way as if those rights were the rights of an ordinary citizen who appeared in court. If the Government is no higher, it is certainly no lower than any other litigant in the eye of law. I shall therefore deal with the application on that basis alone.

The argument that the plaintiff may be in a position to succeed if the new amendment is allowed is frail and feeble. The courts exist for the administration of justice and to redress wrongs and do not become mere instruments of procedure at the instance of one party to obstruct the path leading to justice or means to redress of a wrong. The procedure of the court, in fact, is designed to facilitate justice and to keep the machinery thereof in smooth running. If the amendment is permissible and the law allows the amendment at this stage it is irrelevant that the Government may not be able to find a defence to the new pleading. All I have got to consider is whether this plea should be allowed to be taken at this stage or not. I do not think that the proposed amendment is dishonest. Arguments have already been addressed to me by the learned Senior Federal Counsel, on behalf of the Government, on regulation 44. The prejudice referred to in the decided cases is the prejudice whereby the position of a party may be so altered that it cannot be compensated by costs. Leave is given to amend the pleadings even at the hearing although the court does not readily allow such amendments if the necessity for such amendments should have been abundantly apparent much earlier and was not asked for. In this case, however, although the plaintiff should have asked for an amendment of the statement of claim at a much earlier stage I do not think the delay is fatal to the application provided the defendant can be compensated by costs. There can be no prejudice whatsoever to the defendant. As I have said earlier the entire case revolves on the determination of pure questions of law. All the evidence is already before the court. No fresh evidence is required or likely to be led on the issues which may arise as a result of the amendment. No new cause of action is being introduced by the plaintiff. It is only the validity of the regulations under which he was prematurely retired that comes in question. There can possibly be no sudden surprise about it to the defendant. The nature of the suit still remains the same and it is not changed into a suit of another nature.

In the circumstances I allow the amendment. The plaintiff will, however, pay the costs of the amendment and the costs of the hearing so far. The suit will be adjourned, amended pleadings filed and the defendant will have a right to file an amended statement of defence. The hearing of this suit is adjourned to the 26th at 9.00 a.m. and the hearing will continue on the 27th September.

Order accordingly.

Solicitors: *Lim Kean Chye & Co.*

KONG LAI SOO v. HO KEAN

[A.C.J. (Sharma J.) September 14, 1973]
[Ipoh — Civil Appeal No. 37 of 1972]

Landlord and Tenant — Action for recovery of premises — Obscene act — Allegation that son of tenant exposed his private parts with intention that landlord's daughter living in another part of premises could see them — Whether premises used for illegal or immoral purpose — Control of Rent Act, 1966, s. 16(1)(d).

The appellant had applied for recovery of premises which had been let out to the respondent. The application was based on section 16(1)(d) of the Control of Rent Act, 1966 and it was alleged that one of the sons of the respondent while in the part of the house which was let out to the respondent exposed his private parts with the intention that the landlord's daughter, who was living in another part of the house of which the respondent was not the tenant, could see them. The learned magistrate dismissed the application and the appellant appealed to the High Court.